U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 27 2004

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director determined that the evidence failed to establish the petitioner's ability to pay the proffered wage, and failed to establish that the beneficiary had the required work experience as of the priority date. On appeal counsel states that the evidence establishes the petitioner's ability to pay the proffered wage during the relevant period, and states that the beneficiary had the required work experience as of the priority date.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is February 26, 2001. The beneficiary's salary as stated on the labor certification is $11.62 per hour or $24,169.60 per year.

The evidence relevant to the petitioner's ability to pay submitted by counsel initially and in response to a request for evidence (RFE) issued by the director included the following: copies of Form 1040 U.S. individual income tax returns of the petitioner's owner for 2001 and 2002; two copies of Form 540 California Resident Income Tax Return of the petitioner's owner for 2001; copies of the beneficiary's Form W-2 wage and tax statements for 2001 and 2002; copies of quarterly wage reports of the petitioner for the last quarter of 2001, the first three quarters of 2002 and the first quarter of 2003; and two copies of a letter dated January 16, 2002 from an accountant with accompanying copies of unaudited financial statements of the petitioner dated December 31, 2001. The record in a concurrently filed I-485 Application to Adjust Status of the beneficiary also contains evidence relevant to the petitioner's ability to pay the proffered wage, including copies of the beneficiary's Form 1040A U.S. individual income tax returns for 2000 and 2001.

The evidence relevant to the beneficiary's work experience includes the following: a copy of a letter dated July 2, 2003 from a person on behalf of Denny's Restaurant, Ridgecrest, California, stating the beneficiary's experience as a cook of American food from December 1990 until December 1992; and a copy of an undated letter from a

manager of Kristy's Family Restaurant, Ridgecrest, California, stating the beneficiary's work experience as a cook of American food from November 1992 to December 1996.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date, and continuing until the beneficiary obtains lawful permanent residence, and that the evidence did not establish that the beneficiary had the required four years of experience in the offered job, and denied the petition.

On appeal, counsel submits no additional evidence.

Counsel states on appeal that the beneficiary was on the petitioner's payroll during the period relevant to evaluating the petitioner's ability to pay the proffered wage, and that the petitioner's gross receipts were sufficient to pay the proffered wage. Counsel also states that the beneficiary had the required prior experience.

Since no additional evidence is submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

In determining the petitioner's ability to pay the proffered wage Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the Form ETA 750B, signed by the beneficiary on January 25, 2001, states that the beneficiary had been working as a cook for the petitioner from November 1999 through the present.

The documents submitted in support of the beneficiary's concurrently filed I-485 application to adjust status include copies of the beneficiary's Form 1040A U.S. individual income tax returns for 2000 and 2001. Form W-2 wage and tax statements of the beneficiary and his wife are attached to the beneficiary's tax return for 2001 and the documents submitted by the petitioner in support of the instant petitioner include an employer's copy of the Form W-2 Wage and Tax Statement for the beneficiary for 2001. The record also contains copies of quarterly wage reports for certain quarters in 2001, 2002 and 2003. Those quarterly wage reports show payments to the beneficiary in amounts which are consistent with the information on the beneficiary's W-2 forms.

The beneficiary's W-2 form for 2001 shows that the petitioner paid the beneficiary $13,516.31 in compensation that year. That amount was $10,653.29 less than the proffered wage of $24,169.69.

The record also contains a copy of the beneficiary's Form W-2 Wage and Tax Statement for 2002, showing that the petitioner paid the beneficiary $13,827.46 in compensation that year. That amount was $10,342.14 less than the proffered wage of $24,169.69.

Since the amounts shown on the beneficiary's W-2 wage and tax statements issued by the petitioner in 2001 and 2002 were less than the proffered wage, those W-2 forms fail to establish the petitioner's ability to pay the proffered wage during those years.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant*

Corp. v. Sava, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

In the instant case the evidence indicates that the petitioner is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax returns each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. A sole proprietor must show the ability to cover his or her existing business expenses as well as to pay the proffered wage. In addition, the sole proprietor must show sufficient resources for his or her own support and for that of any dependents. *Ubeda v. Palmer*, 539 F. Supp. 647.

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or approximately thirty percent (30%) of the petitioner's gross income.

For a sole proprietorship, CIS considers net income to be the figure shown on line 33, adjusted gross income, of the Form 1040 U.S. Individual Income Tax Return. The tax returns of the petitioner's owner show the following amounts for adjusted gross income: $15,510.00 for 2001 and $39,096.00 for 2002. If the petitioner had paid the beneficiary in 2001 the additional $10,653.29 needed to raise the beneficiary's compensation to the proffered wage, the amount remaining for the owner's household expenses that year would have been $4,856.71. According to the tax return of the owner for 2001, the owner's household consisted of two persons. The amount of $4,856.71 is insufficient to pay the reasonable household expenses of the petitioner's owner that year.

If the petitioner had paid the beneficiary in 2002 the additional $10,342.14 needed to raise the beneficiary's compensation to the proffered wage that year, the amount remaining for the owner's household expenses would have been $28,753.86. According to the tax return of the owner for 2002, the owner's household consisted of two persons that year. Although no statement of the owner's monthly household expenses was submitted in evidence, the amount of $28,753.86 is found to be sufficient to pay the owner's reasonable household expenses in 2002.

The tax return evidence therefore fails to establish the petitioner's ability to pay the proffered wage in the year 2001, which is the years of the priority date.

The record contains copies of unaudited financial statements dated December 31, 2001, with a letter dated January 16, 2002 from a certified public accountant stating that he compiled those financial statements based on the representations of management. Unaudited financial statements are of little evidentiary value because they are based solely on the representations of management. *See* 8 C.F.R. § 204.5(g)(2). That regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

Regarding the director's decision, the director correctly stated the adjusted gross income of the petitioner's owner for 2001 and 2002 and correctly stated the beneficiary's compensation from the petitioner in those years. The director then concluded that the amount remaining after raising the beneficiary's compensation to the proffered wage in 2001 would have been insufficient to pay the owner's reasonable household expenses. The director also concluded that for 2002 the adjusted gross income of the petitioner's owner was sufficient to have raised the beneficiary's compensation to the proffered wage while also paying the reasonable household expenses of the petitioner's owner. The director's analysis was correct, as was his conclusion that the evidence failed to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The other issue in the instant petition is whether the petitioner has established that the beneficiary met the petitioner's requirements for the position as stated in block 14 of the Form ETA 750 labor certification as of the petition's priority date.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 204.5(d). As noted above, the priority date in this petition is February 26, 2001.

The Form ETA 750 indicated that the position of specialty cook required four years of experience in the position offered. Two letters in the record attest to the beneficiary's experience as a cook. One letter attests to the beneficiary's experience at [redacted] from December 1990 to December 1992, and the other letter attests to his experience at [redacted] from November 1992 to December 1996. Each letter states that the type of food cooked was American food. The position offered, however, is as a specialty cook of Chinese food. Therefore the two letters in the record fail to establish that the beneficiary has the required four years of experience in the position offered. In addition, the letters are inconsistent with information on the Form ETA 750B, signed by the beneficiary on January 25, 2001. On the ETA 750B the beneficiary states that he worked as a cook for 32 hours a week at a [redacted] December 1990 to November 1995. Those dates overlap with the dates when the beneficiary was purportedly working at the Denny's Restaurant and at the [redacted]

Moreover, the Form ETA 750B requires the beneficiary to list all jobs held within the past three years and "any other jobs related to the occupation for which the aliens is seeking certification." Form ETA 750B, Item 15. But no reference is made on the ETA 750B in the instant case to any experience of the beneficiary at the above-mentioned Denny's Restaurant from December 1990 to December 1992.

A further inconsistency in the evidence is that the dates of the beneficiary's experience at the Kristy's Family Restaurant are stated on the ETA 750B as from November 1995 to December 1996, dates which are inconsistent with the dates of November 1999 to December 1996 as stated in the letter in the record from a manager of the Kristy's Family Restaurant.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

> It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The petitioner has submitted no further evidence to corroborate the beneficiary's claimed work experience, and has offered no explanation for the evidentiary inconsistencies noted above.

In his decision the director noted some of the evidentiary inconsistencies concerning the beneficiary's work experience, and found that the evidence failed to establish that the beneficiary had the required four years of experience in the offered position as of the priority date. The director's analysis and conclusion on this issue were correct. The petitioner has not overcome the director's decision on the issue of the beneficiary's work experience.

In summary, the evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and fails to establish that the beneficiary had four years of experience in the offered position on February 26, 2001.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.